IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE, Petitioner-Appellant v. JEANNE S. WOODFORD, Director of the Department of Corrections, JILL L. BROWN, Warden And Does 1-50 Respondents-Appellee	CA # 05-15042 DC # C 04-5381 JF EXECUTION IMMINENT: 1/19/05

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORABLE JEREMY FOGEL
United States District Judge

Steven S. Lubliner (SBN 164143)
Law Offices of Steven S. Lubliner
P.O. Box 750639
Petaluma, California 94975
Telephone (707) 789-0516
Fax: (707) 789-0515
Attorney for Plaintiff-Appellant
DONALD J. BEARDSLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

I. INTRODUCTION

In their ongoing campaign to whitewash California's execution process, respondents now describe pancuronium bromide and potassium chloride as "allegedly painful" drugs. (Opposing Brief ("Opp.") at 12. This represents a retreat from their concession in district court that Beardslee would experience torturous pain if he were not properly anesthetized. (ER 542.)

It bears repeating what is at stake here.

> "The evidence is essentially uncontradicted that the injection of either Pavulon or potassium chloride, by themselves, in the dosages required by Tennessee's three-drug protocol would cause excruciating pain. Without sedation, the injection of potassium chloride would, in the words of the anesthesiologist testifying on Mr. Abdur'Rahman's behalf, 'deliver the maximum amount of pain the veins can deliver.' Similarly, persons receiving a massive dose of Pavulon without sedation would be conscious while they asphyxiated. Thus, the ultimate determination regarding whether Tennessee's three-drug protocol causes unnecessary physical pain or psychological suffering depends on the efficacy of the injection of Sodium Pentothal that precedes the injections of Pavulon and potassium chloride." *Abdur'Rahman v. Bredesen*, 2004 Tenn.App.LEXIS 643 (October 6, 2004) at **62-63.

One would think that respondents would not want to associate themselves with such potential horrors and that they would be forthcoming about the problems Beardslee identified in prior executions and about the numerous gaps in their protocol. One would think they would want as much light shed on the

process as possible, if not to put Beardslee's mind at ease, then to mollify a public sharply divided on the wisdom and morality of capital punishment. They have not done so. They have refused to turn over clearly relevant documents, even with a protective order. (ER 478-88.) Their commitment to secrecy finds its most perverse expression in the administration of pancuronium bromide, which silences the most fertile source of information about problems with the process, the condemned man himself.

Respondents offered no facts and no law below, only comfort that no court yet has gone where this Court, in light of California's record, should go. There is not a shred of evidence or legal principle supporting the district court's order denying relief. The requested injunctions should issue.

II. ARGUMENT

A. There is No Undue Delay.

Respondents' selective attack at Beardslee's position on the timing of his claims should be rejected. Respondents ignore *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), where the U.S. Supreme Court held that claims relating to the conduct of an execution are not ripe until the execution is imminent and the circumstances to be litigated are settled. Respondents also ignore that Beardslee's claims were not ripe to exhaust until recently because an inmate may not appeal anticipated actions. 15 CCR § 3084.3(c)(3).

Respondents agree that under *Fierro v. Terhune*, 147 F.3d 1159 (9th Cir. 1998) a challenge to lethal gas is not ripe until an inmate affirmatively chooses it because that method may never be used. (Opp. at 8.) Respondents argue, however, that because lethal injection is the default method, it can always be challenged. (Opp. at 8-9.) This makes no sense because that method also may never be used if the inmate chooses lethal gas. Most importantly, respondents cite no case discussing issues of timing, choice and waiver decided after the U.S. Supreme Court held that an inmate who chooses his method of execution waives any Eighth Amendment objection to that method. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). Given all the relevant precedents, Beardslee's suit was not unduly delayed. If anything, it was early.

Respondents cite this Court's opinion in *Cooper* to argue that Beardslee timed his suit to manipulate the system. "Thus, while the 'avowed purpose' of Beardslee's complaint was to address 'alleged deficiencies in the lethal injection protocol, the timing of [his] action suggests that an equally important purpose is to stay his execution . . . ." (Opp. at 7.) Respondents are doing the manipulating here by cutting off its quote in the middle of a sentence, which concluded: "to continue to pursue his other claims." Unlike Cooper, Beardslee has no other claims. The only goal here is ensuring that if Beardslee must be

executed, that it is done humanely and that his rights are respected throughout the process.

B. The Kevin Cooper Case Does Not Control This Case.

It is difficult to fathom how the district court's order denying a preliminary injunction in *Cooper* can be the benchmark not just for this case but, presumably, for all future lethal injection challenges in California, no matter how the issues are shaped, no matter the equities of each particular case (such as manipulation of the process to litigate successor petitions, which figured heavily in the *Cooper* decision but does not figure here) and no matter the quality of the advocacy.[1] It is all the more difficult to understand this when the district court completely jettisons the case law it relied on in *Cooper* after Beardslee showed in his reply brief why none of these cases controlled. This Court is not bound by anything that happened in *Cooper*, nor was the district court.

C. The District Court Abused Its Discretion and Relied on Erroneous Legal Principles in Denying Beardslee a Preliminary Injunction on His Eighth Amendment Claim.

Through his expert's analysis of execution logs and eyewitness testimony from California lethal injection executions, Beardslee showed that Manny Babbitt and Stephen Anderson probably were conscious during their

[1] If Cooper had proceeded *pro se*, respondents undoubtedly would still argue that the result in his case bound Beardslee and anybody else who followed.

execution and that there were serious concerns that William Bonin's execution was bungled, in that he was given an extra dose of pancuronium bromide. (ER 64-65, 127, 130, 132-34, 212-16.) Beardslee also pointed to numerous gaps or weaknesses in the known execution procedures (ER 62, 66-67, 69-73, 83-121,) evidence deemed relevant in *State v. Webb*, 252 Conn. 128 (2000), a case relied on by the district court in *Cooper* but abandoned here, and *Abdur'Rahman v. Bredesen*, 2004 Tenn.App.LEXIS 643 (February 23, 2004).

Respondent's expert in *Cooper* assumed proper administration and delivery of five grams of sodium thiopental. He did not address the concerns raised by the execution logs or the gaps in Procedure 770, and he offered no opinion, to a degree of medical certainty or otherwise, that the sodium thiopental *actually would be* correctly administered and delivered. Respondents introduced no new expert testimony in this case on these points. Therefore, the district court's finding that "the likelihood of such an error [in administration] occurring 'is so remote as to be nonexistent'" was sheer speculation and, therefore, clearly erroneous in light of the record. (ER 674.)

Of course, the district court did not actually engage with the record in making this finding. Rather, it borrowed the language quoted above from the one case on the merits that respondents cited, a Virginia case, *Reid v. Johnson*, 333 F. Supp. 2d 543, 551 (D.Va.2004). As Beardslee explained in the opening brief, *Reid*

only examined the sufficiency of Virginia's three-drug cocktail. It expressly refused to consider "evidence regarding personnel, training, security, timing, equipment, and the potentiality for human error in the administration of the lethal injection." *Id.* at 549. Therefore, *Reid* cannot be used to resolve concerns about administration and delivery. In relying on *Reid*, the district court applied an erroneous legal premise and misapplied applicable legal standards.

Respondent invites this Court to adopt some of the legal reasoning from *Cooper* that Beardslee distinguished in his reply brief and that the district court declined to rely on below.

> "In its opinion affirming the denial of injunctive relief in *Cooper*, the Court noted that it had 'previously upheld the constitutionality of lethal injection as a method of execution,' and observed that at least two states had rejected such claims under procedures similar to California but with 'lesser dosages of anesthesia.'" (Opp. at 10.)

This Court should decline this invitation.

The Ninth Circuit cases that this Court referred to in *Cooper* were *LaGrand v. Stewart*, 133 F.3d 1253, 1265 (9th Cir. 1998) and *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997). (ER 740.) Both *Poland* and *LaGrand* held that evidence of problems occurring in states other than Arizona was not probative and that there was no evidence of problems that had occurred in Arizona executions. *Poland* at 1105; *LaGrand* at 1064-65. Here, of course, Beardslee has

come forward with evidence of problems in California executions. Thus, *Poland* and *LaGrand* do not control this case.

The two state cases this court referred to in *Cooper* were *State v. Webb*, 252 Conn. 128 (2000) and *Sims v. State of Florida*, 754 So.2d 657 (Fla.2000), two more cases that the district court cited in *Cooper* but not below. Both cases are distinguishable because at the time of the litigation, neither Connecticut nor Florida had conducted a lethal injection execution. *Webb* at 131-33; *Sims* at 664. The challenges thus were facial and necessarily speculative to a degree. Here, of course, California has conducted lethal injection executions, and an unacceptable number of them have not gone well. As noted in the opening brief and in the reply below, *Webb* is also distinguishable because Connecticut presented substantial evidence of procedures and training that, superficially at least, suggests that Connecticut takes great pains to eliminate the possibility of human error.

As in *Cooper*, respondents urge affirmance on the grounds that 37 states employ some method of lethal injection and 27 use the same combination of drug as California. (Opp. at 12.) As Beardslee pointed out in his reply brief below, reliance on a trend in type of execution method conflicts with *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), where this Court refused to condemn hanging as a method of execution simply because most states had discontinued it. "The number of states using hanging is evidence of public perception, *but sheds no light*

on the actual pain that may or may not attend the practice. We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice." *Campbell v. Wood*, 18 F.3d at 682. The nationwide adoption of some form of lethal injection process does not prove that California's procedure is constitutional. Broadly stated, there can be no national consensus on torture.

Appellant has bolstered his California showing with toxicology evidence from executions conducted in other states. Respondents argue that this evidence is irrelevant because the timing and circumstances of the blood draws is unclear. Beardslee's expert, Dr. Heath, also agreed that it would be important to be clear on the timing of the draw. (ER 66.) However, as noted in the opening brief, there are cases of inadequate anesthetization where the timing is quite clear, (ER 158, 160, 162, 164, 299, 300, 311, 373,) and where the doctors conducting the toxicology tests apparently thought the blood levels were too low. (ER 289, 303, 304, 307.) The mere fact that respondents' expert thought the blood levels in the Harper execution in Kentucky were "troubling" counseled in favor of an injunction since things that are "troubling" demand further investigation. While Beardslee was entitled to an injunction based on the California evidence alone, the abundant evidence that problems in lethal injections are occurring throughout the country should trouble this Court, just as it troubled respondents' expert.

D. The District Court Abused Its Discretion and Relied on Erroneous Legal Principles in Denying Beardslee a Preliminary Injunction on His First Amendment Claim.

Respondents argued below, as they do here, that for Beardslee's First Amendment protections to be triggered, he must first prove that he is entitled to injunctive relief on his Eighth Amendment claim. (Opp. at 17.) This is akin to requiring a professor, who challenges a state university's prohibition against publishing on a controversial subject, to prove that he actually has something interesting to say. Respondents have never cited any authority for this counterintuitive proposition, and the district court did not supply any when it accepted this incorrect view of the issue. Assuming Beardslee bore some burden to demonstrate the inherent unreliability of the process, he certainly carried it for the reasons stated in the preceding section.

The district court's holding cannot be reconciled with this Court's holding in *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) ("*CFAC II*"). In that case, this Court required removal of a curtain that prevented the assembled witnesses, including the media, from viewing the early stages of the execution process. This Court held that, particularly in light of prison officials' admitted goal of concealing the reality of the process from the public,

humane execution policies cannot be developed without the ability to gather information about what actually occurs.

Beardslee has made it clear that if his execution must go forward and there is a problem with the thiopental, he wants to be able to communicate that he has not been rendered unconscious and that he is being tortured so that he can contribute to the public debate about capital punishment and methods of execution. Respondents argue that his First Amendment rights need not be respected because, they assure us, nothing will occur that rises to the level of an Eighth Amendment violation. That is not the standard. Even assuming respondents' protocol is fundamentally sound, accidents can and will happen, and Beardslee must be allowed to communicate what he is experiencing, not just out of respect for human dignity, but as a matter of sound social policy. Under the *First Amendment Coalition* case, the public interest is served by bringing any irregularity in the execution process to light, whether denominated an accident or the product of a design flaw and whether or not a court could determine that what happened to Beardslee violated the Eighth Amendment.

Beardslee reiterates that the Arizona Attorney General recommended that the gas chamber be abolished following eyewitness accounts of a particularly harrowing execution. *Gomez v. United States District Court,* 503 U.S. 653, 655-56 (1991) (Stevens, J., dissenting). This could not have occurred if gas chamber

executions were conducted in a windowless or darkened chamber. Such attempts at reform cannot occur in a lethal injection state where pancuronium bromide is administered to silence the inmate. There is no principled difference between administering pancuronium bromide and taping the inmate's mouth, putting a hood on him and strapping his head down to contain his movements.

This Court is not the only court to recognize the interrelationship between the Eighth Amendment and the First Amendment. In *In the Matter of Readoption With Amendments of Death Penalty Regulations N.J.A.C. 10A:23, By the New Jersey Department of Corrections*, 367 N.J. Super. 61 (2004), the Court remanded New Jersey's death penalty regulations for want of sufficient factual support for the various rules. Several of the rules limited media access and activities. In remanding the regulation, the Court stated:

> "Contemporary and evolving community standards of decency and morality are not reliably developed in a vacuum and under sanitized conditions, but rather should be based on an appreciation by the community of just what is involved, in human terms and in terms of decency and morality, in the State's putting a person to death. We do not believe that this is a matter of voyeurism. We believe, to the contrary, that it is a matter of demonstrating to the public the reality of the choices it makes." *Id.* at 71.

Beardslee is necessarily a partner with the public in this ongoing dialogue.

If this Court refuses to enjoin pancuronium bromide to protect Beardslee's First Amendment rights, it is effectively throwing out the truth-seeking

policies at the heart of the *First Amendment Coalition* case and admitting that the rights protected in that case are nothing more than "a matter of voyeurism," the meaningless right to be in the presence of a dead or dying man, uncritically served up as spectacle in whatever manner the State chooses to prepare him. That is not the law, and the district court erred grievously in holding that it was.

The district court did not reach the facts, but it must be noted that respondents still have not attempted to articulate a legitimate penological justification for administering pancuronium bromide under *Turner v. Saffley*, 482 U.S. 78, 84 (1987). This usually is not a difficult element for prison officials to satisfy. Respondents apparently concede that potassium chloride is the substance that actually effects death and that causing prolonged asphyxiation is in itself an Eighth Amendment violation under this Court's precedents.

Pancuronium bromide is a pernicious, unnecessary and constitutionally offensive substance. Appellant was entitled to an injunction.

III. CONCLUSION

For the foregoing reasons, the district court's order denying preliminary relief should be reversed. Appellant is entitled to a preliminary injunction so that both his Eighth Amendment claim and his First Amendment claim may be heard on the merits.

DATED: January 12, 2004

Respectfully submitted:

/s
Steven S. Lubliner
Attorney for Donald Beardslee

CERTIFICATE OF COMPLIANCE (Circuit Rules 32-1, 32-4)

Pursuant to Ninth Circuit Rules 32-1, I hereby certify that the foregoing brief is produced in a proportional font (Times New Roman) of 14 point type and utilizes double line spacing, except in footnotes and extended quotations which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 2,809 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: January 12, 2005

/s

STEVEN S. LUBLINER
Attorney for Appellant
Donald J. Beardslee

PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

APPELLANT'S REPLY BRIEF

() by today depositing, at Petaluma, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid (and/or):

(X) via facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. The phone number for the sending machine is (707) 789-0515. Pursuant to Rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.

() by today personally delivering the said document(s) to the person(s) indicated below in a manner provided by law, by leaving the said document(s) at the office(s) or usual place(s) of business, during usual business hours, of the said person(s) with a clerk or other person who was apparently in charge thereof and at least 18 years of age, whom I informed of the contents.

Dane R. Gillette
Senior Assistant Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Fax: (415) 703-1234

Executed in Petaluma, California on January 12, 2005

/s